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No. 395

In The

Supreme Court of the United States

OCTOBER TERM, 1962

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ESTATE OF W. R. OLSEN, Deceased, KENNETH M. OWEN, ET AL., Executors, and HAZEL D. OLSEN

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Page
Question Presented	1
Statement	2
Argument	6
Conclusion	15

CITATIONS

Cases:

	Page
Commissioner v. Duberstein, 363 U.S. 278	2, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16
Cowan v. United States, 191 F. Supp. 703 (D.C. Ga.), app'l dism'd. F.2d (5th Cir.)	14
Cronheim's Estate v. Commissioner, decided Aug. 17, 1961, pending on appeal (8th Cir.)	12
Fischer v. Commissioner, decided Feb. 28, 1961	12
Kuntz v. Commissioner, 300 F.2d 849 (6th Cir.)	6, 8
Martin v. Commissioner, 36 T.C. 556, affirmed June 28, 1962 (3rd Cir.)	8, 9, 10, 12
Max Kralstein, 38 T.C. (No. 89), decided Sept. 10, 1962	13
Penick v. Commissioner, 37 T.C. 999, pending on appeal (3rd Cir. No. 14089)	12, 13
Pierpont's Estate v. Commissioner, 35 T.C. 65, remanded 301 F.2d 287 (4th Cir.)	5, 8, 12
Rice v. United States, 197 F.Supp. 786 (D.C. Wis.)	
Russek's Estate v. Commissioner, decided Jan. 31, 1961	12
Smith v. Commissioner decided May 29, 1961; affirmed June 28, 1962 (3rd Cir.)	8, 9, 10, 12
United States v. Frankel, 302 F.2d 666 (8th Cir.)	6, 11
United States v. Kasynski, 284 F.2d 143 (10th Cir.)	8, 14
United States v. Reed, 277 F.2d 456 (6th Cir.)	14
Westphal v. Commissioner, 37 T.C. 340, pending on appeal (8th Cir., No. 17059)	12
Wilner v. United States, 195 F. Supp. 786 (D.C. N.Y.)	14

Statutes:

	Page
Internal Revenue Code of 1939 (26 U.S.C.), Sec. 22(b)(3)	2, 13, 14
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 101(b)	14
Sec. 102(a)	1, 2, 7, 13, 14
Minnesota Statutes, Sec. 290.01	15

Revenue Rulings:

Rev. Rul. 58-613, 1958-2 C.B. 914	14
Rev. Rul. 60-326, 1960-2 C.B. 32	14
Rev. Rul. 62-102, I.R.B. 1962-N. 7	14

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The Estate of W. R. Olsen, Deceased, Kenneth M. Owen, et al., Executors, and Hazel D. Olsen respectfully pray that the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in the above-entitled case be denied.

QUESTION PRESENTED

The question presented is whether a voluntary payment made by an employer to the widow of a deceased employee, under all of the facts and circumstances of this particular case, constituted a "gift" within the meaning of §102(a) of the Internal Revenue Code of 1954.

STATEMENT

This case concerns the provision of the Internal Revenue Code which recently was before this Court in *Commissioner v. Duberstein*, 363 U.S. 278, and which excludes from the gross income of a taxpayer "the value of property acquired by gift."[1] It poses the question whether a specific transfer to a taxpayer under all of the circumstances surrounding the transfer in fact amounted to a "gift" to her within the meaning of the statute. The case literally turns upon all of its facts and therefore it is unavoidable that we state those facts in some detail.

W. R. Olsen died from pneumonia following surgery on September 12, 1955, at the age of sixty-seven, after a period of illness of about one week (R. 14, 43). At the time of his death he was actively employed as Secretary-Treasurer by Super Valu Stores, Inc., Hopkins, Minnesota, and had been employed by said employer for more than twenty-three years (R. 14).

Super Valu Stores, Inc., is a company engaged in the wholesale food distribution business, having in the neighborhood of 1,150 employees (R. 41). At the time of the death of Mr. Olsen, there were outstanding 181,479 common shares of said Super Valu Stores, Inc. (R. 14). Of this amount, 3,338 shares were owned by Mr. Olsen, 336 shares by his widow, Hazel D. Olsen, and 150 shares by W. R. Olsen, Jr., his son (R. 14). Super Valu Stores, Inc., stock is traded over-the-counter and there were some 720 common shareholders of said corporation at the time of the death of Mr. Olsen (R. 14).

Following the death of Mr. Olsen, Mrs. Olsen on October

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[1] The operative provision in the case at bar is §102(a) of the 1954 Internal Revenue Code. The corresponding provision of the 1939 Code which was considered by this Court in *Duberstein* was §22(b)(3). The two sections are identically worded, and we do not understand petitioner to assert any distinction between the two sections.

4, 1955, received the sum of $13,623.65 from First National Bank of Minneapolis, as trustee of a qualified profit sharing trust of Super Valu Stores, Inc. (R. 14). This amount was paid to Mrs. Olsen as the designated beneficiary by reason of the death of Mr. Olsen and constituted full payment of all amounts which had been credited to Mr. Olsen up to the time of his death (R. 14).

At the time of his death Mr. Olsen was being compensated by a salary and bonus from his employer and all compensation due him through the date of his death was paid (R. 14, 47).

At a special meeting of the Board of Directors of Super Valu Stores, Inc., held on October 25, 1955, the following resolution was approved:

> "WHEREAS, the death of William R. Olsen constitutes a severe loss to the best interests of this Company; and
>
> "WHEREAS, the Board of Directors of this Company recognize the valuable services which W. R. Olsen has rendered to it during the last several years apart from the usual duties and responsibilities of his position;
>
> "NOW, THEREFORE, BE IT RESOLVED, that the officers of this corporation, and each of them, in the name and on behalf of this corporation, hereby are authorized to pay to the widow of W. R. Olsen, namely Mrs. Hazel Dart Olsen, $5,000 by reason of his death, said amount to be payable forthwith in cash." (R. 15, 26.)

On October 27, 1955, the said $5,000.00 payment was made by Super Valu Stores, Inc., to Hazel D. Olsen (R. 15). It is the proper tax treatment of this payment, in the hands of Mrs. Olsen which is at issue in this case.

Mr. Russell H. Byerly, the then executive vice president and a member of the Board of Directors of Super Valu Stores, Inc., testified at some length concerning the facts surrounding the payment (R. 42-53). Mr. Byerly testified that he was familiar with the circumstances surrounding Mr. Olsen's

death and that Mr. Olsen had been ill only a "very short time, I think about a week" prior to his death (R. 42-43). Mr. Byerly further testified that he had participated in the decision to make the payment to Mr. Olsen's widow (R. 43), and had recommended to the other members of the Board that the payment be made because:

> "Mr. Olsen's death was quite sudden, he had long, distinguished and faithful service with our company. We felt that this payment to his widow at that time was in order and felt that she could probably use the money under those circumstances." (R. 49-50).

Mr. Byerly further testified that consistent views were expressed by the president of the company prior to the meeting (R. 48).

Mrs. Olsen was not employed by Super Valu Stores, Inc., at the time of such payment, was not required to, and did not perform, any services for the company in connection with this payment (R. 45, 47). The payment was not made because of any promise to or agreement with Mr. Olsen that any such payment would be made in the event of his death (R. 43). Super Valu Stores, Inc., did not have in 1955, and does not now have, any general plan or general policy for the payment of any death benefit or other amounts to wives of deceased officers or employees (R. 43, 44).

The receipt of the payment was reported in respondent's joint 1955 Federal income tax return but the payment was excluded from gross income as nontaxable gratuity (R. 23).

The Tax Court held that, since the decedent had rendered "valuable services to the corporation" the payment to Mrs. Olsen "proceeded primarily from the constraining force of a moral duty" and "was not intended to be a gift" (R. 64, 66). The opinion of the Tax Court stated that the Court arrived at its determination from its "consideration and weighing of all the evidence" (R. 66). However, nowhere in the

findings of fact nor opinion of the Tax Court is mention made of what petitioner here has correctly referred to as "the only evidence offered at the trial", viz., the testimony of Mr. Byerly.

The Court of Appeals for the Eighth Circuit reversed as "clearly erroneous" the conclusion of the Tax Court. The Court of Appeals summarized all of the facts just set out, including Mr. Byerly's testimony, from which it extracted the passage quoted above. The Court noted that the Tax Court has sustained the Commissioner solely "in reliance upon Estate of Marvin G. Pierpont v. Commissioner, 35 T.C. 65, and what it considers to be the teachings of Commissioner v. Duberstein, 363 U.S. 278. * * *" 302 F.2d at 672. The Court observed that in *Pierpont* the decedent was "the majority stockholder" of the company making the donation. *Ibid.* Here, as noted above, the decedent and his family owned less than two per cent of the outstanding shares of Super Valu, Inc. The Court quoted copiously from the decision of the Court of Appeals for the Fourth Circuit vacating the decision of the Tax Court in *Pierpont* and remanding that case, but correctly noted that in the instant case the Commissioner did not ask that the case be remanded but preferred "to stand upon the present record." 302 F.2d at 674. The Court of Appeals concluded that upon the state of the record made below, "the only reasonable inference to be drawn from the undisputed evidence" was that "the payment to Mrs. Olsen was a gift and was not taxable." *Ibid.*

ARGUMENT

The petitioner in this case, and in the other cases for which a writ of certiorari is sought[2], relies entirely upon asserted "conflicts" arising out of allegedly varying interpretations by lower courts of the recent decision of this Court in the *Duberstein* and *Stanton* cases. However, petitioner, in none of the petitions, pays more than lip-service to those decisions of this Court. Instead, we submit that a fair-minded evaluation of the petitions makes it inescapably clear that petitioner is not addressing himself to the question of what *Duberstein* and *Stanton* decided but rather is concerned with what he thinks this Court *should* have decided in those cases. What the petitions quite blatantly seek is a rehearing of the same propositions unsuccessfully advanced in *Duberstein* and *Stanton*.

Certiorari was granted in *Duberstein* and *Stanton* "partly because of a claimed difference in the approaches between two Courts of Appeals; but primarily on the Government's urging that, in the interest of the better administration of the income tax laws, clarification was desirable for determining when a transfer of property constitutes a 'gift' and is not to be included in income for purposes of ascertaining the 'gross income' under the Internal Revenue Code." (363 U.S. at 294-95.) The Government argued that "motive" rather than "intent" should be the test of taxability, that a gift should be defined as a transfer motivated by "personal" rather than "business" reasons, that since a corporation ordinarily is without authorized power to make a gift and is not subject to the gift tax, any payment by a corporation should be considered taxable income. *Ibid.* The arguments were rejected by this Court. These are the same arguments

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[2] *Kuntz v. Commissioner*, 300 F.2d 849 (6th Cir.); *United States v. Frankel*, 302 F.2d 766 (8th Cir.).

which the Government has urged at each point in the litigation of these cases.

There is no substance to petitioner's attempts here to differentiate the issues in these cases from the issues in the *Duberstein* and *Stanton* cases. The standards set forth in *Duberstein* and *Stanton* are now the guiding principles for determining what constitutes a "gift" under the statutory exclusion provided by section 102(a). Since transfers to widows in the same manner as transfers to anyone else can qualify as gifts only under section 102(a), those principles plainly govern the taxability or non-taxability of such payments.

Further, the *Stanton* case itself was extremely close on its facts to the facts of these cases, although presenting a much "tougher" case for the taxpayer than these cases. Stanton, it will be recalled, was a corporate officer who, after some disagreement with the directors over the discharge of another employee, tendered his resignation. The resignation was eventually accepted and Stanton was voted a "gratuity" of $20,000 in lieu of any retirement pay. The case afforded this Court ample opportunity to address itself to the same propositions advanced by petitioner in these cases. The fact that the payment in *Stanton* was made to the former employee himself rather than to the widow of a former employee certainly could not have harmed the Government's case for this purpose.

Moreover, both on brief and during oral argument of that case, the Government urged that the decision of this Court in that case would provide principles to govern exactly the sort of cases presented by the instant petitions. In its brief in *Stanton* the Government stated that there were over one hundred decisions dealing with the question of voluntary payments by an employer, many of them quite similar to these cases, and urged that the Court promulgate standards

for governing all such cases. Brief for the United States, *Stanton v. United States*, Supreme Court, October Term, 1959, No. 546, at pp. 5-8, et passim. The specific question of cases such as these came up at least twice in the oral arguments to this Court. Philip Elman, then Assistant to the Solicitor General, during his argument on the *Duberstein* case referred to the cases involving payments to widows of the corporate employees as supporting his contention that the question of whether the recipient has done anything to earn the payment is irrelevant. In the argument on the *Stanton* case the question of payments to widows came up again. Wayne G. Barnett, the Assistant to the Solicitor General, whose name appears on the petitions in the instant case, specifically argued that if the business justification for the use of corporate funds is a feeling of obligation, the payment should be income to the widow. He went on to argue that if it were shown that the corporate shareholders simply liked the widow it would be a gift to her but a dividend to the stockholders.

The petitions in the instant cases advance no valid reason for a rehearing of these arguments. The petition in this case asserts that the decision of the Court of Appeals for the Eighth Circuit in this case and the Court of Appeals for the Sixth Circuit in the *Kuntz* case are "in direct conflict with the decisions of the Third Circuit affirming substantially identical findings by the Tax Court in *Smith v. Commissioner* and *Martin v. Commissioner*, decided June 28, 1962." (Pet. at p. 5.) It may be noted that petitioner fails to mention that two other Courts of Appeal, for the Tenth Circuit and the Fourth Circuit, have also dealt with this problem.[3] Presumably this is because, by no conceivable stretch of the imagin-

[3] *Pierpont's Estate v. Commissioner*, 301 F 2d 287 (4th Cir.); *United States v. Kasmski*, 284 F 2d 143 (10th Cir.).

ation, can any "conflict" be gifrsed from the opinions of the Fourth, Sixth, Eighth and Tenth Circuits in these cases. Nor, upon any more than the most cursory analysis, are the opinions of the Third Circuit in *Smith* and *Martin* in conflict with the views expressed by all of the other circuits.

We will not try the Court's patience with an exhaustive analysis of the myriad differences between the relevant facts of the *Olsen* case and the *Smith* and *Martin* cases, but will point out a few of the more striking differences. The corporations involved in both *Smith* and *Martin* were closely held corporations; in *Olsen* the stock of the corporation was publicly traded and widely held (R. 14). Controlling interests in the corporations involved in both *Smith* and *Martin* were held by the decedent employee and/or his relatives; in *Olsen* the decedent and his family held less than two per cent of the outstanding stock of the corporate employer (R. 14). In both *Smith* and *Martin* the board members authorizing the payment were close relatives of the decedent employee; in *Olsen* there were no such relationships involved. In both *Smith* and *Martin* there was testimony that the resolutions authorizing the payment were adopted without reference to the widow's needs; in *Olsen* the testimony was that due to the "quite sudden" death of the decedent the widow "could probably use the money under the circumstances" (R. 49-50). In both *Smith* and *Martin*, the resolutions adopted provided for payments which were made at the monthly rate of the decedent's salary; in *Olsen* the payment bore no relationship to the decedent's salary (R. 15, 17, 26). In *Martin* there was substantial evidence that corporation had in fact adopted a plan of payments to widows to supplement the officers' pension plan; in *Olsen* the company involved had no plan or policy whatsoever for the payment of any additional death benefits or other amounts to the widows of deceased officers or employees (R. 13, 14). In *Smith* the payments were made

on regular employees' payroll checks, included in the corporation's workmen's compensation policies, and subjected to withholding (for years in which there was no withholding the widow executed a hold harmless agreement on behalf of the corporation). There were no comparable facts in *Olsen*.

To assert that the facts in *Smith* and *Martin* are "substantially identical" with the facts in *Olsen*, set out above at pp. 2-4 of this brief, is little short of irresponsible. To further assert that the Court of Appeals for the Third Circuit "would have affirmed" in *Olsen* is to indulge in totally unfounded speculation. In *Olsen* the Tax Court had given no weight whatsoever to the most critical evidence in the case and the Commissioner was content to stand or fall on the findings made by the Tax Court. To have affirmed in *Olsen* the Court of Appeals for the Eighth Circuit would have had to hold that, there having been past services, there could be, as a matter of law, no "intent" or "motive" or "dominant reason" to make a payment other than to compensate those services, for, on the record, on no other basis could the Tax Court have been affirmed. This, of course, would have put the Court of Appeals in utter disregard of the test as stated by this Court in *Duberstein*, which flatly rejected the proposition just stated. 363 U.S. at 284-85, 287, 288. Nor is there any reason to suppose that the Court of Appeals for the Third Circuit would have sustained the decision of the Tax Court in *Olsen* had it been confronted with that decision. Nothing in the opinions of the Court of Appeals in *Smith* or *Martin* suggests that that Court has adopted the view that an employer cannot, as a matter of law, make a gift to the widow of a deceased employee. Facing a decision which, on the evidence before the trier of fact, could be sustained only on such a proposition of law, and with no request having been made for a remand, it seems reasonable to assume the Court of Appeals would have reversed.

The slender reed upon which petitioner attempts to base a contrary assumption is an aside by the Court of Appeals for the Third Circuit to the effect that the Court cannot "exceed the narrow function" assigned it "regardless of what others have done." However, it is quite clear that the Court of Appeals for the Eighth Circuit, in deciding both *Olsen* and *Frankel*, was extremely alert to the limited scope of review open to the Court. In *Frankel* the Court of Appeals quoted extensively from the observations of this Court that decisions in these cases "must be based ultimately upon the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." Indeed in *Frankel* the Court of Appeals specifically observed that "in the present case the trial judge" has "long experience with the mainsprings of human conduct" which "we, [the Court of Appeals] regard as unsurpassed. * * *" 302 F.2d at 671. In *Olsen* the Court of Appeals applied exactly the same standard of review but was confronted with a wholly arbitrary determination made in utter disregard of the facts presented, so that the Court was "left with the definite and firm conviction" that a mistake had been made in that case. It is difficult to see how the Court could have done otherwise, no matter how restrictive the scope of review. Further, a review of the opinions of the other Courts of Appeals indicates that those courts have a lively appreciation of the "narrow function assigned" to them. It is submitted that the courts of appeal are in fact proceeding case by case, and fulfilling the spirit as well as the letter of this Court's decision in *Duberstein*. An off hand remark by one Court of Appeals, puzzling though it may be, cannot serve to create a conflict where none exists.

In candor, if any conflict has arisen in the application of *Duberstein* it has not been a conflict between courts of appeal, but rather between the Tax Court and every other

lower court. The most casual reading of countless decisions of the Tax Court rendered prior to *Duberstein* makes it perfectly obvious that if the *Olsen* case had arisen prior to that decision, the payment at issue would have been found a gift by the Tax Court. What appears to have happened in *Pierpont* and *Olsen*, frankly, is that the Government was able to sell the Tax Court the exact bill of goods which this Court refused to buy in *Duberstein*. When the Tax Court decided *Pierpont* and *Olsen*, particularly the latter, the Tax Court appears not to have in fact weighed the evidence presented to it but simply to have adopted a new rule of law, *viz.*, that any payment in any way related to an employment situation could not be a gift.

To our knowledge no trial court other than the Tax Court has wandered off on a similar frolic. Further, it now may well be that we are no longer justified in assuming the Tax Court is disregarding the evidence in deciding these cases[4]

[4]Certainly in a number of the fact situations in which the Tax Court has held payments to widows of employees to be income, the Tax Court was undoubtedly right. As has been developed above, the Court may have been justified in the decisions reached in the *Martin* and *Smith* cases. Several of the other recent cases were also probably correctly decided by the Tax Court on the evidence before it. For instance, in *Fischer* v. *Commissioner*, decided February 28, 1961 (1961 P-H T.C. Mem. Dec. paragraph 61,061) and *Russek's Estate* v. *Commissioner*, decided January 31, 1961 (1961 P-H T.C. Mem. Dec. paragraph 61,028), the corporate resolutions setting up the widow pension plan were adopted during the husband's lifetime and stated that they were "for services rendered and hereafter to be rendered" by the employees. The payments clearly were not gifts. Similarly *Cronheim's Estate* v. *Commissioner*, decided August 17, 1961 (1961 P-H T.C. Mem. Dec. paragraph 61,232) pending on appeal (8th Cir.), involved a corporation which "followed a practice of salary continuations for varying short periods of time to widows and surviving minor children of deceased, long-time executives." Further, there the resolution was that "the salary of [the decedent] be continued," was adopted "without consideration of Emily's [the widow's] current or future needs" and the Tax Court also found it "most significant" that the resolution "did not specifically mention Emily either by name or as the widow." The cases of *Westphal* v. *Commissioner*, 37 T.C. 340, pending on appeal (8th Cir.), and *Fenick* v. *Commissioner*, 37 T.C. 999, pending on appeal (3rd Cir.), are close cases. In *Westphal* the Tax Court had before it a resolution "to continue the salary" of the decedent to his widow whom the directors "had never met" and of whose financial needs the directors "had no knowledge", before determin-

In any event, the day by day review of fact finding by trial courts is not the proper function of this Court but of the courts of appeal. There is no evidence which suggests that the Courts of appeal are failing to deal with these problems rationally, consistently and soundly in accordance with the teaching of this Court in *Duberstein*.

Finally, petitioner asserts that this Court should rehear *Duberstein* and *Stanton* because voluntary payments to widows of corporate employees are "common" and present difficult problems of administration which must be "disposed of without flooding the courts with litigation." It is difficult to extend much sympathy, or even credence, to the petitioner's plea for help in formulating an administrative policy in this area. To stem a similar "flood of litigation" under Section 22(b)(3) of the 1939 Code, which, of course, was identical to Section 102(a) of the 1954 Code, the Commissioner ruled with respect to "voluntary payments to widows by their deceased husband's employers" that the service would no longer litigate "cases involving the taxability of such payments unless there is clear evidence that they were intended as compensation for services, or unless the payments may be

ing to whom the payments would be made, company officials "wanted to be sure the payments would constitute a salary deduction to Company." However, the decedent owned only a small part of the outstanding shares of the corporation and subsequent resolutions were adopted after the widow attended a board of directors' meeting and requested that the salary be continued for another six months. In *Penick* the Tax Court took due note of the facts that the widow "was an invalid from arthritis and Parkinson's disease, and it was necessary that she use a wheelchair" and that these facts "were well known to the entire board of directors at the time of the adoption of the resolutions" authorizing the payments. Prior to these payments "the corporation" had never made any payments, as a gift or otherwise, to the widow or family of a deceased officer or director." However, the Court concluded that the payments to the widow "were not made to her because of petitioner's urgent need" and were not gifts. The Tax Court plainly had a difficult time deciding the case and appears to have decided it erroneously. The only question of substance on the appeal would seem to be whether the decision was erroneous "enough" to be "clearly erroneous." For a very recent example of the Tax Court's changed approach to these questions compare *Max Kralstein*, 38 T.C. ... (No. 80), decided September 10, 1962.

considered as dividends." Rev. Rul. 58-613, 1958-2 C.B. 914. Payments "made pursuant to a contract or otherwise binding obligation or pursuant to a plan or statute in effect before the husband's death" were not deemed to be "voluntary" payments within the meaning of the ruling. This was a sensible and workable policy decision. Since the statutory provision involved under the 1954 Code is now conceded by the service to be identical to that under the 1939 Code it would seem entirely reasonable to dispose of the 1954 Code cases on the same basis.

However, if petitioner believes that a "talisman for the solution of concrete cases" is necessary, and he is unwilling to make the judgments necessary under the litigation policy adopted by him under the previous identical statutory provision of the 1939 Code, this Court has already pointed clearly to the next step for petitioner. This Court observed in *Duberstein*, in answer to the same plea, that "* * *. the problem is one which, under the present statutory framework, does not lend itself to any more definitive statement. * * *".

For some time after the enactment of what is now Section 101(b) of the 1954 Code providing for a $5,000 exclusion from gross income of *non-gift* employee death benefits, the Commissioner argued that section meant that no nontaxable *gift* to an employee's survivor could be made in an amount in excess of $5,000. This contention was flatly rejected by the first case to consider it, *United States v. Reed*, 277 F.2d 456 (6th Cir.), *aff'ing per curiam* 177 F. Supp. 205 (W.D. Ky.). The Commissioner then indicated that he would not follow *Reed* "pending further developments on the issue." T.I.R. No. 252, Sept. 12, 1960, republished as Rev. Rul. 60-326, 1960-2 C.B. 32. There were further developments, none of which favored the Commissioner's position. See, e.g., *United States v. Kasynski*, 284 F.2d 142 (10th Cir.); *Cowan v. United States*, 191 F.Supp. 703 (D.C. Ga.), *app'l dism'd* (5th Cir.); *Wilmo v. United States*, 195 F.Supp. 786 (D.C. N.Y.). The Commissioner withdrew the argument on appeal in this case and in the case of *Rice v. United States*, 197 F.Supp. 786 (D.C. Wis.). Finally the Commissioner announced that it would no longer contend that Section 101(b) applied to limit to $5,000 the exclusion from gross income of an amount paid to the widow of a deceased employee "where the payment involved otherwise qualifies as a gift excludable under Section 102(a) of the Code." T.I.R. No. 371, March 19, 1962, republished as Rev. Rul. 62-102, I.R.B. 1962-28, 7.

(363 U.S. at 284-85.) This Court went on to specifically state (363 U.S. at 290):

> "If there is fear of undue uncertainty or overmuch litigation, Congress may make more precise its treatment of the matter by singling out certain factors and making them determinative of the matter, as it has done in one field of the 'gift' exclusion's former application, that of prizes and awards."

In short, if the Treasury feels the present standards are inadequate, it is for Congress to clarify them. There can be little justification for petitioner's nurturing of uncertainty in taxing statutes, particularly with regard to questions such as here involved, and then complaining of the consequence. Petitioner is no stranger to Congress. There is nothing to prevent him from seeking direct legislative enactment of the tests of "gift" which he failed to persuade this Court to accept in *Duberstein* and which he here renews. Nor is there anything to preclude him from a more frontal legislative attack simply taxing business gifts as income.[9] Legislative approaches along these or similar lines might or might not be sustained by the courts. The point is that the petitioner has many feasible alternatives open to him if he but chooses to avail himself of them.

CONCLUSION

We cannot help but be impressed by the tenacity of petitioner in continuing to press undaunted the same arguments which were specifically rejected by this Court in *Duberstein*. Nonetheless, the fact remains that petitioner has advanced no

[9] In Minnesota, for example, the state legislature enacted a statutory provision to the effect that "gross income" included "amounts paid by or on behalf of an employer, whether as gifts or otherwise, by reason of the death of an employee." M.S.A. Sec. 290.01, Subd. 20. The provision remained on the books for only about a year and a half and was then repealed by virtue of the adoption of a new definition of gross income. Minnesota Laws, Ch. 213, Art. IV, and Ex. Sess. Ch. 51, Sec. 1 (1961), amending M.S.A. Sec. 290.01, Subd. 20.

valid reason for this Court to rehear the matter. Petitioner suggests that there is a conflict among the Circuits in applying *Duberstein*. However, a reasonably dispassionate lawyer-like study of the cases makes it clear that there is no such conflict. Petitioner asserts that there is administrative difficulty in applying the present law. However, this Court has already made it plain that it has no litmus-paper test with which to deal with the "gift-income" problem. Nor, for that matter, has petitioner given indication of any new thoughts or "tests" which he did not advance in *Duberstein*. Therefore no useful purpose would be served by granting certiorari in these cases. If petitioner is confronted with administrative problems, those problems are of his own making and any number of solutions to the problems are at his own fingertips. Petitioner has always the opportunity of seeking legislative change, and he must assume a responsibility in this regard which taxpayers as individuals cannot assume. In any event, petitioner has brought forward nothing here which warrants his asking this Court to repudiate its decisions which were rendered less than 24 months ago and which thoroughly disposed of the identical arguments raised by the petitions in these cases.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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